84-321

NO._____

Office - Supreme Court, U.S.
FILED
AUG 27 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

EARNEST JAMES STURDIVANT, RESPONDENT

APPENDICIES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

GERRILYN V. GRANT
ASSISTANT ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

34pp

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

STATE OF ALABAMA, PETITIONER

VS.

EARNEST JAMES STURDIVANT, RESPONDENT

APPENDICIES TO THE
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT AND COURT OF CRIMINAL
APPEALS OF ALABAMA

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

GERRILYN V. GRANT
ASSISTANT ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

TABLE OF APPENDICIES

PAGE

APPENDIX "A", CERTIFICATION, AS OF JULY 17, 1984, OF ORDERS IN STURDIVANT V. STATE, ____ So. 2d ____ (Cr.App. Ala., Nov. 29, 1983)..... 1

APPENDIX "B", OPINION IN EX PARTE: STURDIVANT; Re: STURDIVANT V. STATE; ____ So.2d ____ (S. Ct. Ala., May 11, 1984)..... 3

APPENDIX "C" ORDER DENYING REHEARING BUT MODIFYING OPINION; ___ So.2d ___ (S.Ct.Ala., July 6, 1984)..... 12

APPENDIX "D", Opinion In Sturdivant v. State, ____ So.2d ____ (Cr. App. Ala., 1984)..... 17

APPENDIX "E", JOINT MOTION TO CORRECT THE RECORD..... 21

CERTIFICATE OF SERVICE..... 31

APPENDIX "A"

THE STATE OF ALABAMA ---
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

2 Div. 394

Earnest James Sturdivant

vs.

State of Alabama

Appeal from Dallas Circuit Court
#CC-81-107R.01

I, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, do hereby certify that the above-styled appeal was affirmed by this Court without opinion on November 29, 1983, and that the application for rehearing was overruled by this Court without opinion on January 10, 1984.

I further certify that on May 11, 1984, the Court of Criminal Appeals was reversed and the cause remanded to this Court by the Supreme Court of Alabama and

that the Supreme Court of Alabama overruled the application for rehearing on July 6, 1984, and the cause is presently pending on the dockets of this Court.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 17th day of July, 1984.

/s/ MOLLIE JORDAN
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX "B"

MAY 11, 1984

THE STATE OF ALABAMA -----
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

Ex parte Earnest James Sturdivant

83-441

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Earnest James Sturdivant

v.

State)

BEATTY, JUSTICE.

The petitioner, Earnest James Sturdivant, was convicted of the charge of second degree robbery in the Circuit Court of Dallas County, Alabama, on May 5, 1982. He filed a petition for a writ of error coram nobis on May 17, 1983, alleging that he was denied the effective assistance of counsel due to the failure

or his court-appointed attorney to file a timely notice of appeal. The trial court denied that petition. Sturdivant appealed that denial to the Alabama Court of Criminal Appeals on September 29, 1983, and that court affirmed the trial court's judgment, without opinion. After the Court of Criminal Appeals denied his application for a rehearing, Sturdivant petitioned this Court for a writ of certiorari. We granted the writ to determine whether the Court of Criminal Appeals erred in affirming the trial court's judgment.

At the coram nobis hearing in the trial court, Sturdivant testified that he was first represented by Ed Greene. When Greene returned to his position as chief deputy district attorney of Dallas County, Robert Blair became Sturdivant's lawyer. Sturdivant testified that, after

his conviction, Blair visited him at the county jail and Sturdivant told him to appeal his conviction.

Blair testified that he and Sturdivant on several occasions after the trial and talked about taking an appeal. He further stated that he informed Sturdivant that "the possibility of a successful appeal was very slim at best," and, therefore, he discouraged his client from taking an appeal. He also advised his client that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree. The State's brief indicates that Blair thought that an appeal would be frivolous because, in his opinion, no error had been committed. Additionally, during the last conversation which Blair had with Sturdivant prior to the

expiration of the time for appeal, Sturdivant indicated that he would "go and build his time and get it over with." Subsequently, Sturdivant told Blair he wanted to appeal, and Blair told him the time for appeal had run out.

Sturdivant asserts that he was denied the effective assistance of counsel because Blair failed to comply with the requirements of Anders v. California, 386 U.S. 738 (1967). In Anders, the Court addressed the "extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." Anders had been convicted of the felony of possession of marijuana and subsequently sought to appeal. He moved that the California

District Court of Appeal appoint counsel for him. The court granted that motion, and the attorney filed a no-merit letter in the appellate court, stating:

> "I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him. ...[H]e wishes to file a brief in this matter on his own behalf."

Anders then asked for the appointment of another attorney, but the court denied that request, so Anders filed his brief pro se. After the State had filed its brief, Anders filed a reply brief, following which the District Court of Appeals affirmed the conviction. The United States Supreme Court granted certiorari after the Supreme Court of California and the District Court of Appeal denied Ander's petition for a writ

of habeas corpus.

The United States Supreme Court reversed and remanded the cause stating:

> "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to

> raise any points that he chooses; the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." (Footnote omitted.) Anders, supra, 386 U.S. at 744.

In Alabama, state law requires the appropriate appellate court to proceed to a decision on the merits. Code of 1975, §12-22-130, provides:

> "A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the supreme court or court of criminal appeals may appeal

> from the judgment of conviction to the appropriate appellate court."

Applying Anders to Alabama practice, once counsel has complied with the requirements of that case, the Court of Criminal Appeals may grant counsel's request to withdraw, but must appoint substitute counsel to argue the appeal for the indigent.

In the case at bar, the requirements of Anders were not followed. Sturdivant's statement that he would "go and build his time" did not necessarily mean that he did not wish to contemporaneously proceed with the appeal; thus his counsel was not relieved of his duty to either appeal the conviction or to withdraw from the case after following the guidelines of Anders. Due to this inadvertent failure, Sturdivant was denied the procedure set forth in Anders

and, therefore, the trial court should have granted Sturdivant's petition. It also follows that the Court of Criminal Appeals erred in affirming that denial.

Accordingly, we have no option but to follow the mandate of the Anders opinion and, therefore, we must reverse the judgment of the Court of Criminal Appeals and remand this cause to that court with directions to allow petitioner an out-of-time appeal. See Longmire v. State, 443 So.2d 1265 (Ala. 1982). It is so ordered.

REVERSED AND REMANDED.

All the Justices concur.

APPENDIX "C"

MAILING ADDRESS: TELEPHONE: 261-4609

P. O. Box 157
Montgomery, Alabama 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 83-441

EX PARTE: EARNEST JAMES STURDIVANT
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS
(RE: EARNEST JAMES STURDIVANT VS. STATE)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell _____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

XXXX Application for rehearing overruled; opinion modified. All Justices concur.

NOTE: Please substitute the attached page 2. in the opinion which was mailed to you on May 11, 1984.

7-6-84m

Robert G. Esdale, Clerk

By: /s/ Dorothy F. Norwood
Dorothy F. Norwood,
Deputy Clerk
Supreme Court of Alabama

Court of Criminal Appeals on September 29, 1983, and that court affirmed the trial court's judgment, without opinion. After the Court of Criminal Appeals denied his application for a rehearing, Sturdivant petitioned this Court for a writ of certiorari. We granted the writ to determine whether the Court of Criminal Appeals erred in affirming the trial court's judgment.

At the coram nobis hearing in the trial court, Sturdivant testified that he was first represented by Ed Greene. When Greene returned to his position as chief deputy district attorney of Dallas County, Robert Blair became Sturdivant's lawyer. Sturdivant testified that, after his conviction, Blair visited him at the county jail and Sturdivant told him to appeal his conviction.

Blair testified that he and Sturdivant on several occasions after the trial talked about taking an appeal. He further stated that he informed Sturdivant that "the possibility of a successful appeal was very slim at best," and, therefore, he discouraged his client from taking an appeal. He also advised his client to the effect that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree. The State's brief indicates that Blair thought that an appeal would be frivolous because, in his opinion, no error had been committed. Additionally, during the last conversation which Blair had with Sturdivant prior to the expiration of the time for appeal, Sturdivant indicated that he would "go and build his time and get it

over with." Subsequently, Sturdivant told Blair he wanted to appeal, and Blair told him the time for appeal had run out.

Sturdivant asserts that he was denied the effective assistance of counsel because Blair failed to comply with the requirements of Anders v. California, 386 U.S. 738

APPENDIX "D"

AUGUST 14, 1984

THE STATE OF ALABAMA--
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF
CRIMINAL APPEALS

OCTOBER TERM, 1983-84

2 Div. 394

Earnest James Sturdivant

v.

State

Appeal from Dallas Circuit Court
On Remand from Supreme Court of Alabama

PATTERSON, JUDGE

On original deliverance this court affirmed the trial court's judgment, without opinion, denying Earnest James Sturdivant's petition for a writ of error coram nobis, wherein he alleged that he had been denied effective assistance of counsel due to the failure of his court appointed attorney to file a timely

notice of appeal. After this court denied his application for a hearing, he petitioned the Supreme Court of Alabama for a writ of certiorari, which was granted.

The Supreme Court of Alabama has determined that the requirements of Anders v. California, 386 U.S. 738 (1967), were not followed in this case, and that Sturdivant's defense counsel was not relieved of his duty to appeal the conviction or withdraw from the case following the guidelines of Anders. The Supreme Court further determined that due to the inadvertent failure of the defense counsel to perfect an appeal, Sturdivant was denied the procedure set forth in Anders, and therefore , the trial court should have granted his petition. Sturdivant v. State, [Ms. 83-441, May 11,

1984] ___ So.2d ___ (Ala., 1984). The Supreme Court held that this Court erred in affirming the judgment of the trial court, and reversed and remanded the cause to this court with directions to allow Sturdivant an out-of-time appeal. Sturdivant v. State, supra.

Accordingly, the judgment of the circuit court denying the petition for writ of error coram nobis is reversed, and this cause is remanded to that court with directions that the petitioner be afforded an out-of-time appeal, pursuant to the authority expressed in Sturdivant v. State, supra.

In reference to the out-of-time appeal referred to above, it is directed that the time for filing the Record on Appeal shall begin to run as if notice of appeal had been given on the date of this

opinion; otherwise the Alabama Rules of Appellate Procedure shall apply.

REVERSED AND REMANDED.

ALL JUDGES CONCUR.

APPENDIX "E"

[NOTE: The following is a joint motion filed by the parties in the Court of Criminal Appeals of Alabama after the Alabama Supreme Court denied rehearing. It was drafted by counsel for Appellant Sturdivant and endorsed by counsel for the State of Alabama.]

IN THE ALABAMA COURT OF
CRIMINAL APPEALS

EARNEST JAMES STURDIVANT,	)	
	)	
Appellant	)	
	)	
vs.	)	2 Div. 394
	)	
THE STATE OF ALABAMA,	)	
	)	
Appellee	)	

JOINT MOTION TO CORRECT THE RECORD

COMES NOW the Appellant, Earnest James Sturdivant, by and through his attorneys or record, Blanchard L. McLeod and J. Patrick Cheshire, and the Appellee, State of Alabama, by and through its Assistant Attorney General,

Joseph G. L. Marston, III and its Attorney General, Charles A. Graddick, and would jointly move this Court to correct the record in this cause in the following respects:

1. That Page 2 of the Opinion of the Supreme Court of Alabama rendered on July 6, 1984, recites the following:

> "...He also advised his client to the effect that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree." (Emphasis added.)

2. That the record in this cause does not support such a statement.

3. That the Appellant's only testimony relating to this point is as follows:

****

> Q. What are you saying he told you about an appeal?

A. He told me -- he told me about an appeal that I -- that if I appealed it and come back, I could get more time.

Q. That's what he told you?

A. He told me that if I got a new trial it could possibly get more time. (TR.13)

****

Q. ...Now what are you saying that he did or didn't do that he should have done in that respect?

A. On appeal, when he came back out to the jail after I got sentenced, I told him to get the case appealed, but he didn't.

Q. Did he tell you why he wasn't going to?

A. He told me that I could get more time. I could get more time, and that's about all. (TR. 15-16)

4. That Mr. Blair, the attorney of record for the Appellant in the Trial Court testified as follows:

> A. ...That if the Appeal should be granted and he should be successful on appeal, the chances were extremely high that he would be brought back to Dallas County and that he would be retried and that the evidence would be the same or substantially the same as it was in his first trial. That the likelihood was great that he would be convicted and that all his efforts and all the time he spent on appeal would be for naught.... (TR. 28)

5. That attached hereto and marked as "Exhibit A" is the affidavit of Robert R. Blair, the attorney who represented the Appellant in the Trial Court; and that such affidavit contains matters not presented at the hearing on the Petition for Writ of Error Coram Nobis on August 5, 1983, and that the matters presented in such affidavit should be considered, along with the record herein.

6. That the portion of the sentence referred to in Paragraph One herein is erroneous and reflects badly upon the reputation of an honorable member of the bar of this State; and further, that such statement by the Supreme Court of Alabama is tantamount to a finding of fact that such incompetent advice was given; and that such statement by the Supreme Court of Alabama is not supported by the record herein.

7. That this Court should correct the portion of the referenced sentence referred to in Paragraph One herein to properly reflect the testimony in this cause.

RESPECTFULLY SUBMITTED this the 25th day of July, 1984.

/s/ Blanchard L. McLeod, Jr.
Blanchard L. McLeod, Jr.
Attorney for the Appellant
P. O. Box 656
Selma, Alabama 36702

/s/ J. Patrick Cheshire
J. Patrick Cheshire
Attorney for the Appellant
P. O. Box 656
Selma, Alabama 36702

/s/ Charles A. Graddick
Charles A. Graddick
Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

/s/ Joseph G. L. Marston, III
Joseph G. L. Marston
Assistant Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

STATE OF ALABAMA)
)
COUNTY OF DALLAS)

EXHIBIT "A"

AFFIDAVIT OF
ROBERT R. BLAIR

BEFORE ME, the undersigned authority, a Notary Public, in and for the State and County, personally appeared Robert R. Blair, who is known to me, and after being by me first duly sworn, does, on his oath, depose and say as follows:

"My name is Robert R. Blair and I am a licensed, practicing attorney in Selma, Dallas County, Alabama. I was the attorney of record for Earnest James Sturdivant in the trial of his case in the Circuit Court of Dallas County, Alabama, on May 4 and 5, 1981.

"Both the Attorney General's Office and the attorneys for Earnest James Sturdivant have provided me with copies of the Opinion of the Supreme Court of Alabama issued on July 6, 1984, and the transcript of the hearing on the Petition of Earnest James Sturdivant for Writ of Error Coram Nobis held in the Circuit Court of Dallas County, Alabama, on August 5, 1983, and I have reviewed both.

"I was never asked at the hearing on August 5, 1983, whether or not I advised Mr. Sturdivant that he could be retried for robbery in the first degree or

whether or not I told him that he could receive more time in the case at bar. I specifically deny that I ever told Mr. Sturdivant that if his conviction in the case at bar was reversed, that he could be retried for robbery in the first degree; and I further deny that I ever told Mr. Sturdivant that he could receive more time than he already had.

"During the weeks immediately after Mr. Sturdivant's trial in CC-81-107R, there was pending in the Circuit Court of Dallas County, Alabama, an indictment in case no. CC-81-108R, which is not before this Court, an indictment charging Mr. Sturdivant with robbery in the first degree arising out of the same events as the robbery of the Cougar Station, but alleging Leola Jones as the victim and one purse and one watch as the property taken. I did tell Mr. Sturdivant that

the prosecutors had indicated a strong desire to prosecute him for that charge; that, if convicted of robbery in the first degree against Leola Jones, he could face a possible life sentence and that I had filed a Motion to Amend the Plea or to Dismiss in that case. The trial court did not rule on that motion until after appeal time had expired, and the Court agreed with me on that Motion and dismissed the second indictment against Mr. Sturdivant. It is possible that Mr. Sturdivant confused in his mind what I was telling him about the pending robbery charge with the possibilities of what might happen to him depending on the outcome of an appeal in the case at bar.

"The above information is true, accurate and correct to the best of my knowledge, information, and belief."

/s/ Robert R. Blair
Robert R. Blair
Attorney at Law
P. O. Box 976
Selma, Alabama 36702
(205) 872-7431

SWORN TO AND SUBSCRIBED BEFORE ME

this the 18th day of July, 1984.

(SEAL)

/s/ Joyce Clements Reed
Notary Public, State at Large

Commission Expires:
9-25-85

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, do hereby certify that on this _____ day of August, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys* for Earnest James Sturdivant, Petitioner, and a courtesy copy on his former attorney**, by mailing the same to them first-class postage prepaid and addressed as follows:

Hon. Blanchard L. McLeod, Jr.*
Hon. J. Patrick Cheshire
Attorneys at Law
P. O. Box 976
Selma, Alabama 36702

Hon. Robert Blair**
Attorney at Law
P. O. Box 976
Selma, Alabama 36702

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL